

Islamic Wealth Taxation and Financing Public Health

*An Interdisciplinary Analysis of Human
Rights, Islamic Law, and the Constitution of
Kenya*

By

Lyla A. Latif

**Islamic Wealth Taxation and Financing Public Health: An
Interdisciplinary Analysis of Human Rights, Islamic Law, and the
Constitution of Kenya**

By Lyla A. Latif

This book first published 2023

Ethics International Press Ltd, UK

British Library Cataloguing in Publication Data

A catalogue record for this book is available from the British Library

Copyright © 2023 by Lyla A. Latif

**All rights for this book reserved. No part of this book may be
reproduced, stored in a retrieval system, or transmitted, in any form or
by any means, electronic, mechanical photocopying, recording or
otherwise, without the prior permission of the copyright owner.**

Print Book ISBN: 978-1-80441-330-2

eBook ISBN: 978-1-80441-331-9

Table of Contents

Table of Contents	vii
Abbreviations	ix
Arabic Definitions	xi
Swahili Definitions.....	i
Table of Figures	ii
Preface.....	xv
Acknowledgements	xvii
Chapter 1: Introduction.....	1
Background: Health Budget Constraints and <i>Zakat</i>	5
Health budget	5
<i>Zakat</i>	10
Is there a need for a scholarly contribution on <i>zakat</i> ?	13
Scope of the Book	16
Human rights and Islamic law on the right to health	20
The scope of article 2(1) of the ICESCR on maximum available resources	23
The Legal Issues Arising	27
Structure of the Book.....	29
Methodological Approaches Tailored to the Kenyan Context	30
PART I – FINANCING THE RIGHT TO HEALTH	
Overview	37
Chapter 2: Financing The Right to Health - <i>Interpreting Maximum Available Resources</i>	38
Introduction	38
State Obligations Relating to the Normative Content of the Right to Health	41
Core requirements and progressive realisation of the right to health linked to finance	45
State obligations of conduct and result linked to finance	47
Re-interpreting the MAR Obligation to Give Recourse to <i>Zakat</i>	52

MAR: A focus on taxes.....	54
MAR: Recourse to <i>zakat</i>	58
Human Rights Scholarship on the Scope of MAR.....	63
Conclusion	74
Chapter 3: The Kenyan Approach to Financing Health – <i>Giving</i>	
<i>Meaning to Maximum Available Resources</i>	76
Introduction	76
Financing: Role of Institutions, Actors and Health Law.....	82
Colonial period: 1895-1963	83
Independence and current period: 1963-2022	92
Fulfilling Health Obligations Through Public Health Strategies	97
The Constitutional and Legislative Approaches to the Right to	
Health and its MAR obligation in Kenya.....	105
Conclusion: General Framing of Health Finance and MAR Obligation ..	112
PART II – LEGAL SYSTEMS	
Overview	117
Chapter 4: Legal Permissibility under Islamic Law on the use of	
<i>Zakat</i> by A Non-Islamic State to Finance Health.....	121
Introduction	121
The Methodology of Studying Islamic Law	125
Sources of Islamic law	125
Schools of Islamic thought.....	127
Islamic methodology	129
Zakat: Background.....	134
The beneficiaries of <i>zakat</i>	134
<i>Zakat</i> is not <i>sadaqa</i>	134
<i>Zakat</i> is the Islamic form of tax on wealth	136
Categories of <i>zakat</i>	138
State involvement in collecting <i>zakat</i>	139
Permissibility of Using Zakat to Finance Health	142
Permissibility of Extending Zakat to Cover Health Finance for	
Non-Muslims.....	144
Permissibility of Giving <i>Zakat</i> to a Non-Islamic State.....	150
Islamic law concerns.....	151
Use of Islamic methods	155
Conditional permissibility exists under Islamic law to give	
<i>zakat</i> to a non-Islamic state	158
Conclusion	159

Chapter 5: The Kenyan Legal System and its approach to accepting Zakat – <i>Permissibility under The Constitution of Kenya</i>	163
Introduction	163
The Constitutional Issues Arising.....	165
Background to the Constitution and Shaping of its Norms.....	167
Complex Constitutional Hierarchies.....	171
The constitution on religion	173
Interpreting the constitution	179
The Kenyan Legal System and its Relationship with Islamic Law	183
The legal application of Islamic law	186
Can Islamic law on <i>zakat</i> be accommodated?	191
Conclusion	205
PART III – PHENOMENOLOGICAL ACCOUNTS	
Overview	209
Chapter 6: Muslims in Kenya - <i>Their History, Schools of Jurisprudence and Social Groupings</i>	213
Introduction	213
Muslim History, Religion, Politics and Social Groupings.....	213
Understanding the past	213
Moving to the present	225
Political Tensions with the Kenyan State.....	228
Scholarship on <i>Zakat</i> in Kenya	233
Conclusion	237
Chapter 7: Phenomenological accounts from fieldwork in Mombasa and Nairobi	238
Introduction	238
The Methodology	240
Key interview questions	244
Getting Started: Research Design	245
Fieldwork: COVID-19 impacts and limitations	247
Participant selection	249
Data organisation	254
Going into the field.....	255
Data Presentation and Analysis.....	259
Quantitative data	259
Coding.....	259
Responses from <i>zakat</i> payers (Group 1).....	263

Responses from <i>imams, ustadhas</i> , Islamic experts, FBOs, and authority figures (Group 2)	268
The governance of <i>zakat</i> in Kenya: An adaptive system based around routine solidarity	272
Responses from members of parliament, healthcare workers, academics, people of different faiths and an NGO (Group 3)	276
Conclusion	282
Chapter 8: Conclusion.....	285
Overview	285
Contributions to Scholarship.....	286
Socio legal scholarship	287
Key takeaways.....	288
Relationship between law and politics	296
Looking Forward.....	297
A national model on <i>zakat</i> and policy considerations.....	297
Further insights	300
Final Remarks: <i>Zakat</i> - The Islamic Wealth Tax	303
Bibliography	304

Abbreviations

AU	Africa Union
CESCR	Committee on Economic, Social and Cultural Rights
CHSSP	County Health Sector Strategic and Investment Plan
CMS	Central Medical Store
CMS/MIS	Central Medical Store Management Information System
DFRDP	District Focus Rural Development Plan
ECOSOC	Economic and Social Council
FBO	Faith Based Organisation
GC	General Comment
GDP	Gross Domestic Product
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IPK	Islamic Party of Kenya
KANU	Kenya African National Union
KEMSA	Kenya Medical Supplies Agency
KHP	Kenya Health Policy
KNH	Kenyatta National Hospital
KHSSP	Kenya Health Sector Strategic and Investment Plan

LNC	Local Natives Council
MAR	Maximum Available Resources
MSCU	Medical Supplies Coordinating Unit
MOH	Ministry of Health
MP	Member of Parliament
MUF	Mwambao United Front
NACOSTI	National Commission for Science, Technology and Innovation
NFD	Northern Frontier District
NHIF	National Hospital Insurance Fund
NHSSP	National Health Sector Strategic Plans
NSSF	National Social Security Fund
OAU	Organisation of African Unity
OPP	Out of Pocket Payment
PBO	Parliamentary Budget Office
PR	Progressive Realisation
SDGs	Sustainable Development Goals
UHC	Universal Health Coverage
UN	United Nations
WHO	World Health Organisation

Arabic Definitions

<i>Alim</i>	A Muslim male who is knowledgeable in Islamic matters
<i>Bait al Maal</i>	Treasury
<i>Daruriyat</i>	Necessities
<i>Dua</i>	Supplication
<i>Fiqh</i>	Islamic jurisprudence
<i>Fuqaha</i>	Islamic jurists
<i>Hajiyat</i>	Needs
<i>Halal</i>	Permissible
<i>Halaqa</i>	Islamic method of debating doctrinal issues to arrive at a consensus. Also: a religious study circle
<i>Haram</i>	Prohibited
<i>Ijma</i>	Consensus
<i>Ijtihad</i>	Independent reasoning
<i>Imam</i>	Muslim male who leads congregational prayer
<i>Isnaad</i>	Chain of narration
<i>Kadhi</i>	Muslim male judge
<i>Madhab</i>	School of thought
<i>Makrooh</i>	Disliked or offensive
<i>Maqasid</i>	Objectives
<i>Usul al Fiqh</i>	Principles of Islamic jurisprudence
<i>Qiyas</i>	Deductive analogy
<i>Qur'an</i>	Muslim scripture

<i>Ramadhan</i>	Ninth month of the Islamic calendar observed as the month of fasting
<i>Ra'y</i>	Personal judgement
<i>Sadaqa</i>	Charity
<i>Sahaba</i>	Companion of the Prophet Muhammed (صلى الله عليه وسلم)
<i>Sheikh</i>	An elderly scholar
<i>Shura</i>	Consultation
<i>Surah</i>	A chapter in the Muslim scripture
<i>Sunnah</i>	Habitual practice of the Prophet Muhammed (صلى الله عليه وسلم)
<i>Sunni</i>	Follower of the sunnah
<i>Tahsiniyat</i>	Luxuries
<i>Taqlid</i>	Precedent
<i>Ulama</i>	Muslim scholars
<i>Ummah</i>	Muslim community
<i>Ustadha</i>	Female Muslim who teaches Islamic education
<i>Usul</i>	Principles
<i>Zakat</i>	Islamic tax on wealth

Swahili Definitions

<i>Duka</i>	Convenience store, or kiosk
<i>Harambee</i>	Self help
<i>Mheshimiwa</i>	Member of Parliament
<i>Mwambao</i>	The coast or coastline
<i>Pwani Si Kenya</i>	'The Coast is not part of Kenya'

Table of Figures

Figure 1: Health budget as percentage of national GDP	78
Figure 2: The entire geography of the East Africa Protectorate (later referred to as the Kenya Colony) of the British Empire	216
Figure 3: The Kenyan coastline along which the Muslims (Arabs and Indians) settled	217
Figure 4: Fort Jesus in Mombasa	219
Figure 5: Modern-day Map of Kenya	220

Preface

This book presents an interdisciplinary analysis of the legal relationship between *zakat*, commonly described as obligatory almsgiving, and financing public health in Kenya. It offers significant contributions to the fields of human rights law, Islamic law, and constitutional law. These three fields representing distinct legal frameworks with different conceptual foundations converge in the debate surrounding *zakat's* potential contribution to financing public health. Through the doctrinal and theoretical examination of this convergence, the book offers important insights into socio-legal scholarship. It highlights three theoretical takeaways concerning the legal permissibility of recognising and including *zakat* as part of the maximum available resources' obligation under human rights law which requires states to use all available resources to provide essential health services, the Islamic doctrinal perspectives around the use of *zakat* for financing health, and the constitutional concerns around the Kenyan state accepting to use *zakat* with its Islamic conditions to finance public health.

Firstly, it highlights the complexity and fluidity of legal systems, especially in situations where different legal frameworks interact, which necessitates an interdisciplinary approach. Secondly, it demonstrates that legal frameworks can influence each other, and their convergence may provide innovative solutions to complex legal problems. The application of the Islamic law on *zakat* to finance public health in Kenya provides new interpretations and understandings of human rights law's obligations to ensure maximum available resources for health. Thirdly, it shows the consideration of politics in the conceptualisation and use of law as having significant implications for the fields of human rights law, Islamic law, and constitutional law.

The doctrinal and theoretical examinations presented in the book are challenged by the phenomenological accounts collected during fieldwork, shedding light on the ways that politics becomes embedded in how people conceptualise and use the law. This highlights the importance of

understanding as part of socio legal scholarship how power dynamics, cultural and religious beliefs, and political structures influence the application and interpretation of legal principles, emphasising the need for scholars to incorporate a nuanced understanding of political realities when examining constitutional and religious legal frameworks.

Dr. Lyla A. Latif, 2023

Acknowledgements

All praise and gratitude are due to Allah for the blessing of knowledge. I am deeply thankful for the encouragement and support I have received from numerous individuals and institutions throughout the process of writing this book, which examines the potential of *zakat* to finance health programs in Kenya.

I would like to express my profound appreciation to Professors John Harrington, Mark Fathi Massoud and Russell Sandberg for their invaluable guidance in navigating the complexities of this interdisciplinary work. I am also grateful for the insightful feedback provided on some of the chapters by Professors Ambreena Manji and Abdullahi An’Naim, as well as Dr Stephen Smith, Dr Sara Dezalay, Dr Paul McDonough, Dr Gitte Heij, and Dr Gedion Onyango.

I extend my heartfelt gratitude to the participants of my research interviews and to all those who facilitated these interviews and assisted me during my fieldwork. Their invaluable contributions and insights have been central to the success of my research, for which I am deeply grateful to them.

My warmest thanks go to my loving mum and dad for believing in me and being my unwavering pillars of support, providing me with endless *dua* and encouragement to see this work through to completion. I would also like to extend my appreciation to my family and close friends who continuously rooted for me throughout this journey. I want to thank Attiya Waris, a visionary, and a wonderful friend for introducing me to the research world.

This work is dedicated to my parents, and all my teachers.

Chapter 1

Introduction

This book focuses on the legal relationship between *zakat* and financing public health in Kenya. Specifically, it examines whether *zakat* can legally be recognised as a source of revenue for financing public health and if human rights and Islamic law permit such a possibility. The book aims to provide an understanding of whether these legal frameworks can offer solutions to the problem of revenue limitations in financing public healthcare, with the focus on the challenges faced by the Kenyan state in accepting *zakat* as part of the health budget. The choice of *zakat* as a financing form is significant, considering that there are other financing forms such as taxation, donor aid, and health insurance. However, these are not always reliable sources of revenue.¹ Many African states face challenges in generating sufficient tax revenues due to informal economies, corruption, and tax evasion.² Similarly, donor aid is often subject to changing priorities and can be unreliable. Health insurance, on the other hand, can be expensive and difficult to access for many individuals, particularly in low-income settings.

The book, therefore, focuses on *zakat* because it is a continuous mandatory obligation for Muslims to annually pay 2.5 per cent taken off the total net value of their gold, silver and cash savings that have reached a specific threshold set by the Muslim clerics.³ *Zakat* is to be given to specific beneficiaries, especially the poor. It is a longstanding and established

¹ J Vageesh, 'Harnessing the Power of Health Taxes' (2020) *BMJ* 369.

² C Lumina and N Tamale, 'Sovereign Debt and Human Rights: A Focus on Sub-Saharan Africa' (2021) *African Sovereign Debt Justice Paper Series*.

³ Y Al Qaradawi, *Fiqh Al Zakah, Vol II: A Comparative Study of Zakah, Regulations and Philosophy in the Light of Qur'an and Sunna*, trans. Monzer Kahf (Scientific Publishing Centre, Jeddah, 2001).

religious obligation that many Muslims feel a moral duty to fulfil.⁴ It is therefore, a reliable and potentially sustainable source of revenue that can be collected locally and used to support public health initiatives. Additionally, *zakat* is specifically intended to support those in need, including the poor and vulnerable, making it a particularly appropriate source of funding for health care expenses.

The book recognises that in proposing *zakat*, it brings to the fore questions around why a minority group in Kenya should be giving some of its funds to the Kenyan state to access the services it needs and for which they are already paying state-imposed taxes. The contribution of the book lies in exploring the boundaries of this claim. The book does not propose the imposition of taxes on any religious group. The proposal to use *zakat* as the potential source of revenue for financing public health in Kenya is not necessarily an argument for burdens of healthcare expenses to be borne at the local level. Rather, it is an exploration of how religious communities can contribute to public health financing, specifically through the voluntary payment of *zakat*, which is an obligation in Islam. In this way, the proposal is not imposing a new burden on these communities, but rather leveraging an existing religious obligation to support the poor and those in need.

The proposal on the use of *zakat* to finance public health is not intended to absolve the state of its responsibility to fund public health programmes. Instead, it is seen as a supplement to existing state efforts. The book examines the extent to which the legal frameworks of human rights, Islamic law, and Kenyan constitutional law permit the use of *zakat* for financing public health. It does not make any policy prescriptions or recommendations but rather seeks to contribute to scholarship on the interaction between legal frameworks and social and political realities.

The research design that supports the book to conduct its investigation combines the use of doctrine, legal theory, and the methods of inquiry

⁴ M Kahf, 'Zakat: Unresolved Issues in the Contemporary Fiqh', (1989) *Journal of Islamic Economics*, Vol 2, No 1, 1-22; R Powell, *Zakat: Drawing Insights for Legal Theory and Economic Policy from Islamic Jurisprudence*, (2010) 7 *PITT. Tax Review*. 43.

available under socio-legal research with Islamic doctrine and methodology. This is necessary to guarantee the validity and reliability of conducting doctrinal analysis and norm considerations, based on the recognised and robust methodologies used under human rights and Islamic law to derive legal rulings.

The book postulates that the convergence of human rights law, Islamic law, and constitutional law in the context of using *zakat* to finance public health in Kenya provides new interpretations and understandings of legal obligations to ensure maximum available resources for health. In formulating this proposition, I was aware that legal frameworks cannot be examined in isolation from the social, cultural, and political realities that shape their implementation and interpretation. Therefore, part of this proposition was investigated through fieldwork. The fieldwork findings challenged the premise by revealing the complex relationship between law and politics and the disassociation of normative claims from the lived reality of individuals. The framing of the proposition and the findings from fieldwork discussed in Chapter 7 demonstrate that socio legal scholarship must be complemented by an understanding of the political and social dynamics that influence the application and interpretation of legal principles. The importance of phenomenological accounts as part of socio legal scholarship allows for a more comprehensive understanding of the realities of legal frameworks in practice and how they are influenced by broader social and political dynamics.

The aforementioned premise provides an understanding that while doctrinal analysis and legal theory provide a solid framework for understanding the permissibility of using *zakat* to finance public health, the reality on the ground may not always match up to these ideals. This premise alongside the findings discussed in Chapter 7 shed light on how the practise of human rights and Islamic law is embedded in the social and political realities of Kenya.

There are five objectives of this book. Firstly, to examine whether the *maximum available resources* obligation under human rights law can be construed to place an obligation on states to achieve the right to health using *zakat*. Secondly, to consider how the Kenyan Government interprets

its *maximum available resources* obligation under human rights law to finance health. Thirdly, to identify the existence of any criteria under Islamic law that provide legal permissibility for the use of *zakat* by a non-Islamic state. Fourthly, to understand whether the Constitution of Kenya and its legal system can recognise and lawfully implement the Islamic law conditions on *zakat*. And finally, to give voice to duty bearers and rights holders to speak about their views on the use of *zakat* to finance health.

A study based on an examination of *zakat* to finance health in Kenya – a non-Islamic Muslim-minority state – offers an exciting opportunity to explore these five objectives, particularly because of the country's historical connection with Islam. To date, studies on *zakat* have largely focused on Muslim-majority states;⁵ none have considered *zakat* from the perspective of a non-Islamic Muslim-minority state with a constitution that potentially could recognise Islamic norms on *zakat*.

Currently, governments are facing austerity measures, rising debt, low taxable population, rising cost of living, amidst their obligation to implement measures needed for the enjoyment of human rights and achievement of Sustainable Development Goals (SDGs). The United Nations SDGs Agenda, the Africa Union Agenda 2063, various National Development Plans (NDP) of countries require governments to strengthen their domestic revenue mobilisation strategies and identify new revenue streams. This is crucial given that Official Development Aid is declining. The proposal that this book makes is to offer a fiscal solution. Its relevance lies in its answer to the imperative under UN SDGs, AU Agenda 2063 and NDPs for states to source additional local funds. The book proposes a revenue stream which does not impose any additional burden on taxpayers. Further, it puts to rest the academic squabbles that deny

⁵ S Al Sayyid, *Fiqh Al Sunnah: Az Zakah and As Siyam*, trans. Muhammad Saeed Dabas and Jamal al Din Zarabozo (Islamic Printing & Publishing Co, Egypt, 2000); Y Al Qaradawi, *Fiqh Al Zakah, Vol II: A Comparative Study of Zakah, Regulations and Philosophy in the Light of Qur'an and Sunna*, trans. Monzer Kahf (Scientific Publishing Centre, Jeddah, 2001); M Kahf, 'Zakat: Unresolved Issues in the Contemporary Fiqh', (1989) *Journal of Islamic Economics*, Vol 2, No 1, 1-22; R Powell, *Zakat: Drawing Insights for Legal Theory and Economic Policy from Islamic Jurisprudence*, (2010) 7 *PITT. Tax Review*. 43.

compatibility of Islamic law with human rights by demonstrating the intersecting points at which Islamic law and human rights doctrine intertwine. The book provides raw data on Kenyan stakeholder perceptions on the proposal to offer *zakat* to finance public health revealing the intricate and complex law, political, cultural, and societal considerations at play.

Following from this, the next sections explain the background and scope of the study, highlights the research problems that are tackled, and sets out the structure of the book, pointing towards its research questions and methodology.

Background: Health Budget Constraints and *Zakat*

Health budget

The Kenyan health sector, as in many other countries, is dependent on the percentage of the national budget allocated to meet its development and recurrent expenses. As a result of this dependency, the health sector faces considerable challenges in meeting its expenses. It is unable to ensure equitable access to public health facilities throughout the country, especially within rural and remote areas.⁶ It is incapable of posting an adequate number of healthcare workers in those areas. Further, essential medicines are unavailable, infrastructure and equipment are outdated and inadequately available throughout the country, and access to public health facilities is restricted because of distance, lack of tarmac roads, and readily available transport in rural and remote areas in the various counties.⁷

The Kenyan Government has not developed a comprehensive fiscal plan that identifies sources of revenue and matches those sources to meet the

⁶ Republic of Kenya, Kenya Health Sector Strategic Plan 2018-2023: Mid Term Review Synthesis Report (2021) 55.

⁷ L Latif, F Simiyu, and A Waris, 'A Case Study on the Application of Human Rights Principles in Health Policy Making and Programming in Cherangany Sub County in Kenya', (2017) *Integrative Journal of Global Health* 1, No 1.

health needs of its citizens. Instead, several health policies have been prepared by the Ministry of Health that specify the different health programmes which sum up the entire health needs of the local population. These health programmes were set out in the Kenya Health Policy Framework 1994-2010,⁸ and revised later through the Kenya Health Policy 2014-2030.⁹ They relate to improving maternal health, reducing infant and child mortality, and combating HIV/AIDS, tuberculosis, and other communicable and non-communicable diseases. These health programmes were implemented through the National Health Sector Strategic Plans I and II and were later improved under the Kenya Health Sector Strategic and Investment Plans of 2014-2018 and 2018-2023.¹⁰ These policies and strategic plans were prepared without reference to a financial strategy to implement them. This means that achieving the targets under the health programmes may have been impeded by the lack of adequate funds, since the health sector is incapable of generating its own sources of revenue.

In fact, the health sector budget allocation has been consistently reducing over the years. For example, the health sector budget for the 2016/2017 fiscal year was set at 3.8 per cent – well below the recommended 15 per cent of the national budget the Kenyan Government agreed to allocate to the health sector under the Abuja Declaration 2001, which was signed by all Member States of the Africa Union to improve health finance.¹¹ In 2019, the health budget was increased to 5.5 per cent, and following the COVID-19 health crisis in 2020-2021, the Government increased this to 6.5 per cent. Yet, the Kenyan health budget remains below the recommended target of 15 per cent agreed under the Abuja Declaration. The suboptimal allocation

⁸ Government of Kenya, Ministry of Health, 'Kenya's Health Policy Framework' (Nairobi: Government Printer, 1994).

⁹ Government of Kenya, Ministry of Health, 'Kenya Health Policy 2014-2030: Towards Attaining the Highest Standards of Health' (Nairobi: Government Printer, 2014).

¹⁰ Government of Kenya, Ministry of Health, 'Kenya Health Sector Strategic Plan 2014-2018' (Nairobi: Government Printer, 2014) and Government of Kenya, Ministry of Health, 'Kenya Health Sector Strategic Plan 2018-2023' (Nairobi: Government Printer, 2018).

¹¹ Organisation of African Unity. 'Abuja Declaration On HIV/Aids, Tuberculosis and Other Related Infectious Diseases, Abuja, Nigeria, 26-27 April 2001 OAU/SPS/ABUJA/3. Declaration.PDF (safaid.net)

of health expenditure in Kenya, with spending constituting less than 15% of GDP results in the multitude of challenges described in the paragraphs above, adversely affecting the population, including Muslim Kenyans. In this context, *zakat* emerges as a vital instrument to mitigate these challenges.

The health budget reports between 2010 and 2020 show that in addition to relying on the national budget for funds, the health sector is dependent on out-of-pocket payments (OPPs), donor aid, and international assistance to finance most of its health programmes related to maternal and child health, combating HIV/AIDS, tuberculosis, malaria, and sexually transmitted diseases, as well as providing essential medicines.¹² The sector also faced the additional financial burden of treating COVID-19 and its related long term health complications.¹³ The absence of a fiscal plan through which a health financing strategy ought to have been prepared for the health sector has thus restricted the realisation of the right to health in Kenya. Its absence has also limited the health sector in identifying and promoting the use of innovative or alternative health financing sources to reduce OPPs and increase the total health spending per capita by the Government.

This is not to say that the Government has not considered innovative and alternative health financing schemes to make healthcare accessible for the poor. An example of an innovative health financing scheme is the Output-Based Aid voucher programme, funded by the German Development

¹² Republic of Kenya, 'Kenya Health System Assessment 2010' (Nairobi: Government Printers, 2010); Republic of Kenya, 'Kenya Health Sector Strategic Plan 2018-2023: Mid Term Review Synthesis Report' (Nairobi: Government Printers, 2021); Republic of Kenya, Ministry of Health, 'Kenya National Health Accounts 2015/2016' (Nairobi, Government Printers, 2019). Also see: E Kabia, R Mbau, R Oyando et al, 'We are called the et cetera: experiences of the poor with health financing reforms that target them in Kenya', (2019) *International Journal for Equity in Health* 18, No: 98; S Illinca, L Di Giorgio, P Salari et al., 'Socio-economic inequality and inequity in use of health care services in Kenya: evidence from the fourth Kenya household health expenditure and utilisation survey', (2019) *International Journal for Equity in Health* 18, No: 196.

¹³ P N Ouma, A N Masai and I N Nyadera, 'Health coverage and what Kenya can learn from the COVID-19 pandemic' (2020) *J Glob Health* 10(2):020362.

Bank.¹⁴ This voucher allows rural women living in poverty to access maternal health care and family planning in participating health facilities. However, the voucher must be purchased at a nominal fee.

Further, this type of health financing requires donor support and minimal OPP by users of the voucher. Placing reliance on donor aid is not consistent with article 2(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR)¹⁵ to which Kenya is a party, and which requires states to utilise to the maximum their domestically available resources to achieve the rights recognised under the Covenant. Neither is it consistent with article 43 (1) (a) of the Constitution of Kenya that places the obligation on the Government to guarantee the highest enjoyment of the right to health. The ICESCR and the Constitution of Kenya are the basis for the book to inquire into the normative and doctrinal permissibility on the use of *zakat* for financing health. This inquiry further extends into questioning whether Islamic law permits *zakat* to be given to the Kenyan state to finance health and considers through fieldwork the acceptability of this proposition.

The obligation is first upon the domestic state to generate resources to progressively realise health rights, and then consider and place reliance on international assistance, to provide support where the government is incapable. *Zakat* is available in Kenya. It could be offered to finance public health. Chapters 4, 5 and 7 expound on this. However, in making *zakat* available to the Kenyan state as a domestic source of revenue, it will be subject to greater control, accountability, and legitimacy than donor aid. *Zakat* is a more sustainable source of revenue for Kenya than donor aid. Thus, while it may be possible and even legally permissible under Islamic

¹⁴ S Lee and A Adam, 'Designing a Logic Model for Mobile Maternal Health e-Voucher Programmes in Low- and Middle-Income Countries: An Interpretive Review', (2022) *Int. J. Environ Res. Public Health*, 19:295; OECD, *OECD Development Co-operation Peer Reviews: Germany* (OECD Publishing, 2015); N Bellows, 'Vouchers for reproductive health care services in Kenya and Uganda', (2012) KFW Discussion Paper.

¹⁵ United Nations, Committee on Economic and Social Council. 'International Covenant on Economic, Social and Cultural Rights.' United Nations, Treaty Series, 16/12/1966.

law and human rights law for *zakat* to be used in this way, it does not necessarily mean that it 'should' be mandatory or a preferred policy option.

To determine whether *zakat* should become an obligation for the financing of public health, a range of factors need to be considered, including the impact on the Muslim community, the effectiveness of *zakat* in generating revenue, and the potential implications for the broader health financing system. Additionally, the political and social dynamics that shape the implementation of *zakat* and its acceptance by the state and society will need to be considered. The 'should' question also raises broader normative issues, such as the principles of distributive justice and the role of the state in providing for the welfare of its citizens. These issues go beyond the legal frameworks of human rights, Islamic law, and constitutional law and require a multidisciplinary approach to arrive at a well informed and balanced policy decision.

The focus and contribution of this book are to examine the legal relationship between *zakat* and financing public health in Kenya from an interdisciplinary perspective. The book underscores the complexity and fluidity of legal systems, particularly in situations where different legal frameworks interact, necessitating an interdisciplinary approach. The application of Islamic law on *zakat* to finance public health in Kenya yields new interpretations and understandings of human rights laws obligations to ensure maximum available resources for health. This demonstrates that legal frameworks can influence each other, and their convergence may provide innovative solutions to complex legal problems. However, the book does not directly tackle the issue of 'could' verses 'should'. While it acknowledges that just because something is possible or permitted does not necessarily mean it should occur, the book does not provide a definitive answer to this question. Instead, it offers insights into how legal frameworks can converge and influence each other, and how this may provide innovative solutions to complex legal problems.

Zakat

Zakat is an Arabic word which means ‘to purify’– a symbolic metaphor intended to make virtuous the act of including the poor and needy members of society as part of the beneficiaries of one’s wealth, without which they would be unable to afford and pay for their basic needs. *Zakat* is a fundamental pillar of the Muslim faith. It has been described by Al Qaradawi: the late contemporary Muslim authority on *zakat*, as ‘*financial worship*’.¹⁶ A Nairobi-based Islamic law scholar, whom I interviewed in my fieldwork for the book, describes *zakat* as:

A right due to the poor from the rich; by right, I mean a specific percentage of a rich person’s wealth. This wealth can take many forms; money, produce from land, abundance in domestic animals which the rich must set aside for the benefit of the poor.¹⁷

The interviewee considered, *zakat* as a ‘conscientious financial obligation towards the poor and others mentioned in the *Qur’an* arising from the decree of Allah (God).’¹⁸ Another Islamic law expert, whom I interviewed, defines *zakat* ‘as a system for the management of paupers so that they are not left out of the structures society has put in place for their wellbeing and development.’¹⁹ A Muslim woman preacher in Nairobi, whom I also interviewed, explains that:

Zakat is the right specific people have on our wealth. It is the moral and legal duty to set aside what Allah has ordered out of our wealth for the poor, needy, debtors, travellers and so on. *Zakat* purifies the giver’s wealth. *Zakat* contributes to our society and improves it by reducing poverty. It ensures the giver plays a role in society instead

¹⁶ Al Qaradawi, (n 3).

¹⁷ Interviewee No 144. Interview date 20.02.2020 Nairobi

¹⁸ Interviewee No 144. Interview date 20.02.2020 Nairobi

¹⁹ Interviewee No 139. Interview date 15.02.2020 Nairobi

of being a miser and confining his wealth to himself which serves no purpose.²⁰

Zakat, therefore, is the Islamic equivalent of tax on wealth. It is paid once annually by adult Muslims to specific beneficiaries. There are eight categories of beneficiaries listed in the *Qur'an*.²¹ The poor and needy are considered as priority beneficiaries. Literature on *zakat* has referred to it as charity, alms, obligatory charity, and as wealth tax.²² This book accepts the reference to *zakat* as a tax on wealth. This is because *zakat* is an obligatory payment of 2.5 per cent on the value of specified forms of wealth, made by eligible Muslims annually, to prescribed beneficiaries.²³ Seeing it as a tax on wealth allows for a discussion on whether the Kenyan state can access it.

In this regard, the issue of whether *zakat* can be considered a form of tax when collected by the state is then a valid concern. From an Islamic legal perspective, *zakat* is not considered a tax, but rather an act of worship and a religious obligation for Muslims to give a portion of their wealth to support the poor and needy in society. Conversely, conventional taxes are obligatory payments to the government, levied to fund public goods and services, without a direct religious or spiritual aspect.²⁴ However, when the state collects *zakat* on behalf of the Muslim community, it can be argued that it takes on a role similar to that of a tax collector. In the context of financing public health, the collection of *zakat* by the state could be seen as

²⁰ Interviewee No 133. Interview date 15.02.2020 Nairobi

²¹ The following eight recipients are listed in Surah Al Tawbah, Chapter 9, verse 60; (1) the poor, (2) the needy, (3) those employed to collect *zakat*, (4) those whose hearts are to be inclined towards Islam/bringing them towards Islam, (5) freeing captives, (6) debtors, (7) for the cause of Allah and (8) the traveller.

²² A Rano, 'A Treatise on Socioeconomic Roles of Zakah' MPRA Paper No 81155 (2017); MS Al-Uthaymeen, *Fiqh of Worship: Purification, Doctrines, Salat, Zakat, Siyam, Hajj*, trans. Abdallah Alaceri. (London: Al-Firdous Ltd, 2011); Powell (n 1) 43; S Bashear, 'On the Origins and Development of the Meaning of *Zakat* in Early Islam' (1993) *Arabica* 40, No 1, 84-113; Kahf (n 4).

²³ Al Sayyid (n 5).

²⁴ RA Musgrave and PB Musgrave, *Public Finance in Theory and Practice* (New York: McGraw-Hill, 1989).

a way to supplement state resources to address the healthcare needs of the population. Nonetheless, it is crucial to differentiate between the conceptualisation of conventional taxes and *zakat*.

Conventional taxes are typically rooted in the principles of public finance and are based on an individual's income, wealth, or consumption, without any religious or moral considerations.²⁵ In contrast, *zakat* is an Islamic religious obligation with specific rule, such as the categories of eligible recipients and the types of wealth subject to *zakat*. These distinctions underscore the unique nature of *zakat* as a form of religious giving, which differs from conventional taxation. Furthermore, it is important to note that the voluntary nature of *zakat* is a crucial aspect of its religious significance. If the state were to collect *zakat* as a mandatory tax, it could potentially compromise the religious freedom of Muslims who may object to the state's involvement in the collection and distribution of *zakat*. The implication of this argument in linking *zakat* to tax lies in the potential for utilising *zakat* as an additional financial resource to address the deficits in the health budget, while acknowledging and respecting its distinct nature and religious significance. By drawing parallels between the roles of tax and *zakat* in financing public health, the argument highlights the possibility of harnessing *zakat* in a complementary manner to conventional taxation.

There are two forms of *zakat*: *zakat al fitr*, which is specifically distributed in kind as food to the poor in *Ramadhan* before the *Eid* prayer, and *zakat al maal*, which is the annual tax on wealth. This book focuses on the latter, since it has a broader purpose aligned towards the social and economic improvement of the poor, and is usually paid out on cash savings, assets, shares, stocks, bonds, digital currencies, livestock, gold, and silver. These categories of *zakat* must be in the possession of an adult Muslim and must reach a specific threshold for a Muslim to be considered eligible for *zakat*. For example, in Kenya, Muslim clerics have advised that cash savings of more than KES 260,000 (GBP 1,761) incur *zakat* assessed at 2.5 per cent of total savings.

²⁵ JE Stiglitz, *Economics of Public Sector* (New York: WW. Norton & Company, 2000).